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No. 03-031628

In The Supreme Court of the United States

THE RECTOR AND VISITORS
OF GEORGE MASON UNIVERSITY,

Petitioner,

v.

ANNETTE GRECO LITMAN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Solicitor General has urged this Court to grant certiorari in No. 02-1672, *Jackson v. Birmingham Board of Education*. *See* Brief of the United States as Amicus Curiae at 1, *Jackson v. Birmingham Board of Education*, (May 11, 2004). This petition presents the same question as *Jackson*, but offers a clearer opportunity to resolve the issue. The question presented by both *Jackson* and the present petition is:

> Whether the implied private right of action for violations of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88, extends to claims for retaliation?

PARTIES TO THE PROCEEDING

The petitioner is The Rector and Visitors of George Mason University, which is the official corporate name of a state institution of higher education located in Fairfax, Virginia. *See Virginia Code* § 23-91.24.[1] For purposes of this petition, the only claim at issue is respondent's claim for retaliation under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88.[2]

The respondent is Annette Greco Litman, a former student at George Mason University.

When the University moved to dismiss the complaint on sovereign immunity grounds, the United States intervened for the purposes of defending 42 U.S.C. § 2000d-7, which attempts to abrogate sovereign immunity for Title IX claims and to require the University to waive sovereign immunity for Title IX claims as a condition of receiving federal funds. *See* 5 F. Supp. 2d 366 (E.D. Va. 1998). The United States remained a party in the litigation while the University appealed the district court's decision that sovereign immunity had been waived, *see* 186 F.3d 544 (4th Cir. 1999), and while the University sought certiorari in this Court. 528 U.S. 1181 (2000). However, the United States participated in the most recent court of appeals proceedings, as amicus curiae, not as a party.

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[1] In the district court, the respondent also sued Dr. Geoffrey Orsak, Dean Girhard Mulherin, and Dr. Eugene Norris. The respondent ultimately dropped her claim against Dr. Norris. Dr. Orsak and Dean Mulherin obtained summary judgment in the district court and the court of appeals affirmed those rulings.

[2] The respondent also brought claims for sexual harassment in violation of Title IX and for violation of her constitutional rights, pursuant to 42 U.S.C. § 1983. Those claims were resolved in favor of the University and are not at issue in this petition.

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PETITION FOR WRIT OF CERTIORARI

The Rector and Visitors of George Mason University ("the University") respectfully petitions this Court for a writ of certiorari to review the judgment of the court of appeals, which held that the implied private right of action to enforce Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 ("Title IX"), extends to retaliation claims.

OPINIONS BELOW

The opinion of the court of appeals is unpublished, but is reported as *Litman v. George Mason University*, 92 Fed. Appx. 41 (4th Cir. 2004) (unpublished) (*Litman V*).[3] It is reprinted in the Appendix at App. 1. The opinion of the district court is published and reported as *Litman v. George Mason University*, 156 F. Supp. 2d 579 (E.D. Va. 2001) (*Litman IV*). It is reprinted in the Appendix at App. 5.

JURISDICTION

The court of appeals entered its judgment on February 25, 2004. On May 19, 2004, the Chief Justice, acting as Circuit Justice for the Fourth Circuit, extended the time in

[3] As explained in more detail below, this litigation has a long history. There are three district court opinions, two court of appeals opinions, and a previous petition for certiorari in this Court.

which to file a Petition for Certiorari to June 1, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED IN THIS CASE

This petition involves the following statutory and regulatory provisions:

1. The portion of Title IX prohibiting sex discrimination provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a).

2. The portion of Title IX authorizing the Executive Branch to promulgate regulations provides in pertinent part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

20 U.S.C. § 1682.

3. The regulation prohibiting retaliation against those who complain of sex discrimination in violation of Title IX states in pertinent part:

> Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e).

STATEMENT OF THE CASE

This case presents the same issues as No. 02-1672, *Jackson v. Birmingham Board of Education*: whether the implied private right of action to enforce Title IX extends to claims for retaliation. However, unlike the claimant in *Jackson*, the claimant in this case alleges that she is a direct victim of sex discrimination and experienced retaliation because of her complaint about the sex discrimination against her.[4] Thus, unlike *Jackson*, there is no alternative ground for affirmance. Resolution of the

[4] The *Jackson* petitioner is not a direct victim of sex discrimination and, thus, is outside the class of persons protected by Title IX. Even if this Court were to conclude that the implied private right of action to enforce Title IX extended to retaliation claims, the *Jackson* judgment – that the petitioner may not bring a Title IX retaliation claim – would have to be affirmed.

question presented will determine whether the judgment of the court of appeals is affirmed or reversed.

Under the circumstances, this Court should grant certiorari in this case and hold *Jackson*.

Title IX provides in relevant part that "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The statutory text makes no reference to retaliation.[5] *See Lowery v. Texas A & M University System*, 117 F.3d 242, 248, n.6 (5th Cir. 1997) (Retaliation "is not independently prohibited by the proscription against discrimination on the basis of sex in federally-funded educational institutions, which is the heart of Title IX."). The omission of retaliation from Title IX stands in stark contrast to Title VII, 42 U.S.C. §§ 2000e-2000e-17, and the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213. Both statutes contain provisions explicitly prohibiting retaliation. *See* 42 U.S.C. § 2000e-3(a);[6] 42 U.S.C.

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[5] The fact that retaliation is not mentioned in the text is constitutionally significant because Title IX's imposition of conditions on the receipt of federal funds, *see Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287 (1998), implicates the clear statement rule. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Since retaliation is not mentioned in the statutory text, it cannot be inferred. *Id.* at 24; *Virginia Dep't of Educ. v. Riley*, 106 F.3d 559, 566-67 (4th Cir. 1997) (*en banc*). Thus, Title IX cannot be interpreted as implicitly prohibiting retaliation.

[6] Section 2000e-3(a) makes it an unlawful employment practice for any employer to retaliate against an employee or an applicant for employment "because he has made a charge, testified, assisted, or

(Continued on following page)

§ 12203. Despite the fact that retaliation is not mentioned in the text of Title IX, the U.S. Department of Education, acting pursuant to 20 U.S.C. § 1682, has promulgated a regulation, 34 C.F.R. § 100.7(e),[7] which prohibits retaliation against any person who complains about discrimination that violates Title IX.[8]

Although there is an implied private right of action for direct victims of sex discrimination under Title IX, *Cannon v. University of Chicago,* 441 U.S. 677, 688-89 (1979), it is unclear whether that implied private right of action extends to retaliation claims.[9] The Circuits are divided on the question. *Jackson v. Birmingham Bd. of Educ.*, 309

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participated in any manner in an investigation, proceeding, or hearing under this subchapter."

[7] This regulation originally was enacted as a means of effectuating Title VI. However, the U.S. Department of Education has incorporated the Title VI regulations into Title IX. *See* 34 C.F.R. § 106.

[8] Given that there is no mention of retaliation in the statutory text, this regulation is invalid. *See Riley*, 106 F.3d at 566-67 (invalidating a Spending Clause statute's regulation on the grounds that the regulation imposed conditions which were not clearly and unambiguously stated in the statutory text).

[9] Of course, while this Court has held that the implied private right of action to enforce Title IX extends to claims against local governmental entities, *see Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65 (1992), it has never addressed whether the implied private right of action to enforce Title IX extends to claims against the State or state entities such as the University. Indeed, in *Alexander v. Sandoval*, 532 U.S. 275 (2001), this Court explicitly reserved the issue of whether the implied private right of action extended to claims against the States or state entities. *Alexander*, 532 U.S. at 293 (citations omitted). In both the district court and the court of appeals, the University asserted that the implied private right of action did not extend to claims against the State or state entities. The district court declined to rule on the issue, App. 24 n.23 and the court of appeals did not address it.

F.3d 1333 (11th Cir. 2002), *petition for cert. filed* (U.S. May 13, 2003) (No. 02-1672), *call for the views of the Solicitor General*, 124 S. Ct. 365 (Oct. 6, 2003); *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003).

As an extended studies student at the University during the 1990's, Litman enrolled in a computer science course taught by a professor for whom she worked as a research assistant. The professor became infatuated with Litman and engaged in conduct inappropriate to the relationship and unwelcomed by Litman. In February 1996, Litman filed a sexual harassment complaint against the professor with the University. As requested by Litman, the University directed the professor to avoid contact with her, but refused to investigate the complaint further. Finding this response inadequate, Litman sought the intervention of the University's president. She also circulated a petition urging the University to investigate the matter.

When she was unable to locate a professor to supervise her senior research project, Litman believed that the University's engineering faculty would not interact with her due to her sexual harassment complaint. Thereafter, she sent suggestive and hostile email messages to other faculty members who responded by instituting harassment charges of their own against her pursuant to the University's Student Judicial Code. The University's Judicial Board found Litman guilty of those charges and barred her from taking further classes as a non-degree extended studies student. Litman's sexual harassment complaint resulted in a finding that her professor had not violated the University's sexual harassment policy but had failed to

live up to the professional standards expected of the University's professors.

Litman, through her counsel, filed suit in 1997 alleging violations of Title IX (sexual harassment and retaliation) and 42 U.S.C. § 1983 by the University, university administrators, and various faculty members.[10] The district court dismissed or granted summary judgment on all claims except the Title IX claims against the University. *See* 5 F. Supp. 2d 366 (E.D. Va. 1998) (*Litman I*). With respect to the Title IX claims against the University, the district court held that the claims were not barred by sovereign immunity. *See id.* at 375-376. Although the district court found that sovereign immunity had not been abrogated, *id.* at 373-374, it concluded that, by accepting federal funds, the University waived its sovereign immunity for Title IX claims. *Id.* at 377. Because a denial of sovereign immunity is considered a final judgment under the collateral order doctrine, *see Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), the University immediately appealed the denial of sovereign immunity to the Fourth Circuit. The Fourth Circuit affirmed the denial of sovereign immunity. *See* 186 F.3d 544 (4th Cir. 1999) (*Litman II*). The University petitioned

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[10] Over the course of this litigation, three different lawyers have represented Litman. She has appeared pro se at various times and continuously since January of 2001. The National Women's Law Center provided assistance by filing an amicus brief in the court of appeals on the issue of whether the implied right of action to enforce Title IX extends to retaliation claims and by seeking leave to participate in oral argument at the court of appeals. In the event that this Court grants certiorari, it would be appropriate for this Court to appoint the National Women's Law Center to represent Litman.

for a writ of certiorari, but this Court declined to review the case. *See* 528 U.S. 1181 (2000).[11]

After this Court refused to hear the case, the matter was remanded to the district court for resolution of the Title IX claims against the University on the merits. On February 26, 2001, the district court granted the University's Motion for Summary Judgment with respect to the Title IX sexual harassment claim, but denied the Motion with respect to the Title IX retaliation claim. *See* 131 F. Supp. 2d 795 (E.D. Va. 2001) (*Litman III*). While the parties were preparing for trial, this Court decided *Alexander v. Sandoval,* 532 U.S. 275 (2001), which suggested that the implied private right of action to enforce Title IX does not extend to retaliation claims. The University moved to dismiss the Title IX retaliation claim in light of *Alexander* and the district court agreed, dismissing the Title IX retaliation claim. *See* 156 F. Supp. 2d 579 (E.D. Va. 2001) (*Litman IV*). Litman then appealed to the Fourth Circuit, which affirmed the district court's resolution of all but the retaliation claim. Following *Peters*, it reversed the district court on the issue of whether Title IX

[11] The University continues to believe that it is unconstitutional for Congress to require a state university to waive its sovereign immunity for certain claims as a condition of receiving federal funds. Quite simply, if Congress cannot abrogate sovereign immunity, it ought not to be able to use its Article I powers to exact waivers of sovereign immunity. The University is seeking this Court's review of that issue in No. 03-____, *The Rector and Visitors of George Mason University v. Shepard* (U.S. May 26, 2004).

provides a private right of action for retaliation.[12] This Petition follows.

REASONS FOR GRANTING THE WRIT

The writ should be granted for two reasons. First, this Court should grant review to resolve a split in the Circuits. The Eleventh Circuit, in *Jackson*, correctly held that the implied private right of action to enforce Title IX does not encompass retaliation claims. *Jackson*, 309 F.3d at 1344-1346. In contrast, the Fourth Circuit in *Peters* and in this case held that the implied private right of action includes retaliation claims. The issue continues to be litigated around the country. This Court must resolve the split.

Second, this Petition offers a better vehicle than *Jackson* for resolving the split in the Circuits. The petitioner in *Jackson* is not a direct victim of sex discrimination. Consequently, the *Jackson* petitioner is not within the class of persons intended to be protected by Title IX and, thus, cannot bring a Title IX action. Therefore, even if this Court were to conclude that the implied right of action to enforce Title IX extends to retaliation claims, the judgment in *Jackson* – that the petitioner may not bring a

[12] The Fourth Circuit granted oral argument on the issue of whether the implied private right of action to enforce Title IX includes retaliation claims, and granted permission to the National Women's Law Center to participate in that argument as amicus curiae on Litman's behalf. However, before argument, the Fourth Circuit decided *Peters* and denied rehearing. The University notified the Court that *Peters* would control on the issue and suggested that the case be removed from the oral argument calendar.

Title IX claim for retaliation – would have to be affirmed. In contrast, Litman alleges that she is a direct victim of sex discrimination and that she was retaliated against as a result of complaining about the sex discrimination against her. Thus, there is no alternative ground for affirmance.

I. THIS COURT SHOULD GRANT REVIEW TO RESOLVE A SPLIT IN THE CIRCUITS.

Since this Court's decision in *Alexander v. Sandoval*, limiting the scope of the implied private right of action for enforcement of Title IX, two courts of appeal have explicitly addressed whether the implied private right of action extends to retaliation claims.[13] Those two courts applied different analysis and reached different conclusions. Moreover, the issue continues to be litigated around the country. *See Burch v. Board of Regents of University of California*, No. Civ. 8-04-0038 (E.D. Cal. Mar. 16, 2004); *Atkinson v. Lafayette Coll.*, No. 01-CV-2141, 2003 WL 21956416 (E.D. Pa. July 24, 2003), *appeal pending*, No. 03-3426 (3d Cir.); *Chandamuri v. Georgetown Univ.*, 274 F. Supp. 2d 71 (D.D.C. 2003); *Mock v. South Dakota Bd. of Regents*, 267 F. Supp. 2d 1017 (D.S.D. 2003); *Johnson v. Galen Health Insts., Inc.*, 267 F. Supp. 2d 679 (W.D. Ky.

[13] Before *Alexander*, the Fifth Circuit held that 34 C.F.R. § 100.7(e) can, of its own, force provide the basis for an implied private right of action for retaliation suffered by individuals not themselves the victims of sex discrimination. *See Lowery*, 117 F.3d at 253. However, after *Alexander*, "the reasoning in Lowery is unpersuasive." *Jackson*, 309 F.3d at 1348 n.16.

2003). This Court should grant certiorari to resolve the conflict.

A. The Eleventh Circuit

In *Jackson*, the Eleventh Circuit concluded that the implied private right of action to enforce Title IX does not extend to retaliation claims.[14] To reach this conclusion, the Eleventh Circuit relied upon three broad propositions. First, nothing in the statutory text of Title IX "indicates any congressional concern with retaliation that might be visited on those who complain of Title IX violations. Indeed, the statute makes no mention of retaliation at all." *Jackson*, 309 F.3d at 1344. Congressional silence "weighs powerfully against a finding that Congress intended Title IX to reach retaliatory conduct." *Id.* at 1345. Second, the fact that when Congress enacted 20 U.S.C. § 1682, it empowered the Executive Branch to promulgate regulations does not mean that the implied private right of action can be expanded, beyond the language of the statute, to include retaliation claims. *Jackson*, 309 F.3d at 1345. The authority to promulgate regulations "plainly does not disclose any congressional intent to imply a private right of action of any kind, let alone against retaliation." *Id.* Third, the fact that there is a regulation, which prohibits retaliation is irrelevant. *Jackson,* 309 F.3d at 1346. "Because Congress has not created a right through Title IX to redress harms resulting from retaliation, 34 C.F.R.

[14] In doing so, the Eleventh Circuit relied in part on the district court's decision in this case. *See Jackson*, 309 F.3d at 1345.

§ 100.7(e) may not be read to create one either." *Jackson*, 309 F.3d at 1346. (citation original).

B. The Fourth Circuit

The Fourth Circuit, in *Peters*, rejected the Eleventh Circuit's analysis and took a very different approach.[15] The Fourth Circuit focused on whether the regulation prohibiting retaliation, 34 C.F.R. § 100.7(e), was a valid interpretation of the statute's prohibition against discrimination.[16] *Peters*, 327 F.3d at 316. Essentially, the Fourth Circuit asked whether the regulation should be given deference under *Chevron USA, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).[17] In concluding that the

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[15] Of course, *Peters* involved the implied private right of action to enforce *Title VI* rather than an implied private right of action to enforce Title IX. However, as the court of appeals noted this is a distinction without a difference. App 4. Titles VI and IX are *in pari materia*, and, therefore, cases interpreting Title VI and Title IX may be used interchangeably in analyzing similar issues under both statutes. *See Cannon*, 441 U.S. at 694-95.

[16] This approach is fundamentally flawed. As one district court observed, the opinion in *Peters*:

> rejects the Supreme Court's approach to analyzing implied private rights of action embodied in *Cannon*, and doesn't mention the Supreme Court's most recent approach to analyzing implied private rights of action embodied in *Alexander*, in favor of the Supreme Court's 1969 decision in *Sullivan*. . . .

Mock, 267 F. Supp. 2d at 1020-21 (citations omitted). In other words, "the Fourth Circuit's reliance on the Supreme Court's approach to analyzing implied private rights of action embodied in *Sullivan* is prohibited by the Supreme Court's approach to analyzing implied private rights of action embodied in *Alexander*." *Id.* at 1021-22.

[17] *Chevron* deference is not the proper standard. Quite simply, *Chevron* deference cannot be applied to a regulation that is intended to

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regulation was a valid interpretation, the Fourth Circuit largely ignored the fact that the statutory text does not mention retaliation. *Peters*, 327 F.3d at 316. Indeed, the Fourth Circuit insisted that the absence of any reference to retaliation does not "lead to an inference that Congress did not mean to prohibit retaliation." *Id.* at 316-17. Instead, the Fourth Circuit relied upon this Court's decision in *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969). The Fourth Circuit interpreted *Sullivan* to mandate that a general prohibition against discrimination be broadly construed and, thus, could include retaliation. *Peters*, 327 F.3d at 317-18. Consequently, the Fourth Circuit found that the regulation prohibiting retaliation, 34 C.F.R. § 100.7(e), was a reasonable interpretation of the statute's anti-discrimination mandate. *Peters*, 327 F.3d at 318. Therefore, the implied private right of action extended to retaliation claims.[18] *Id.* at 318-19.

Given that the Fourth and Eleventh Circuits disagree not only on the resolution of the question presented, but also on the approach to resolving the

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effectuate the substantive provisions of statutes passed pursuant to the Spending Clause power. To explain, Spending Clause statutes must be clear and unambiguous. *Pennhurst*, 451 U.S. at 17. The conditions imposed by a *Chevron* deference applies only where a statute is silent or ambiguous. *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). Thus if a statute is valid Spending Clause legislation, it must be clear and unambiguous and *Chevron* deference cannot apply.

[18] Judge Widener wrote a well-reasoned dissent emphasizing that the *Peters* claimant was not a direct victim of discrimination and adopting the reasoning of *Jackson*. *See Peters*, 327 F.3d at 324-26 (Widener, J., dissenting).

question, it is imperative that this Court resolve the conflict. Certiorari should be granted.

II. THIS PETITION OFFERS A BETTER OPPORTUNITY TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS THAN *JACKSON*.

Petitioner's appeal from the Eleventh Circuit's decision in *Jackson* also provides an opportunity for this Court to resolve the split between the Circuits. However, *Jackson* is a poor vehicle for resolving the question presented.

In addition to ruling that there is no implied private right of action for retaliation under Title IX, the Eleventh Circuit found that the plaintiff was not a member of the class of persons protected by Title IX and therefore had no claim. The *Jackson* petitioner is the coach of a women's basketball team who alleges that he was subjected to retaliation after he complained about how the *women's basketball team* was treated. *Jackson*, 309 F.3d at 1335. There is no allegation that the *Jackson* petitioner was, himself, subjected to sex discrimination. Therefore, as the Eleventh Circuit noted, he may not sue for a violation of Title IX. The Eleventh Circuit explained:

> even if Title IX did aim to prevent and remedy retaliation for complaining about gender discrimination, Jackson plainly is not within the class meant to be protected by Title IX. As *Cannon* held, [20 U.S.C. § 1681(a)] identifies victims of gender discrimination as the class it aims to benefit, and so implies a private right of action in their favor. Nowhere in the text, however, is any mention made of individuals other than victims of gender discrimination. Gender discrimination affects not only its direct victims, but also those

> who care for, instruct, or are affiliated with them – parents, teachers, coaches, friends, significant others, and coworkers. Congress could easily have provided some protection or form of relief to these other interested individuals had it chosen to do so – especially for a harm as plainly predictable as the retaliation here at issue – but it did not do so expressly. Nor does any language in [20 U.S.C. § 1682] evince an intent to protect anyone other than direct victims of gender discrimination. Indeed, as with § 602 of Title VI, the focus of [20 U.S.C. § 1682] is "twice removed" from victims of gender discrimination, **and**, consequently, thrice-removed from individuals like Jackson who are not themselves the victims of gender discrimination. Here, there is quite simply no indication of any kind that Congress meant to extend Title IX's coverage to individuals other than direct victims of gender discrimination. We are not free to extend the scope of Title IX's protection beyond the boundaries Congress meant to establish, and we thus may not read Title IX so broadly as to cover anyone other than direct victims of gender discrimination.

Id. at 1346-47 (citations omitted). Because the *Jackson* petitioner may not sue for a violation of Title IX, the judgment against the *Jackson* petitioner must be affirmed and, more importantly, this Court need not address whether the implied private right of action extends to retaliation claims. *See Peters*, 327 F.3d at 324 (Widener, J., dissenting) (the Court "is not necessarily required to decide whether [Title VI] prohibits retaliation, for the judgment of the district court may be affirmed on the ground that [the claimant], as a person who was not a direct victim of discrimination, is not within the class of persons Congress sought to protect in enacting Title VI.").

In sharp contrast, Litman alleges that she is a direct victim of sex discrimination and that she experienced retaliation because of her complaint about sex discrimination against her. Thus, unlike *Jackson*, there is no alternative ground for affirmance. If the implied private right of action to enforce Title IX extends to retaliation claims, then Litman is entitled to pursue her claims. Thus, if this Court grants certiorari, it can be confident that the question presented will be resolved. Certiorari should be granted.

CONCLUSION

This petition for a writ of certiorari should be **GRANTED.**

Respectfully submitted,

JERRY W. KILGORE
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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ANNETTE GRECO LITMAN,

Plaintiff-Appellant,

and -

UNITED STATES OF AMERICA,

Intervenor / Plaintiff,

v.

GEORGE MASON UNIVERSITY; GEOFFREY ORSAK; GIRARD MULHERIN,

Defendants-Appellees,

and

EUGENE M. NORRIS,

Defendant.

No. 01-2128

NATIONAL WOMEN'S LAW CENTER; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AAUW LEGAL ADVOCACY FUND; AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT; AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, INCORPORATED; CENTER FOR WOMEN POLICY STUDIES; CONNECTICUT WOMEN'S EDUCATION AND LEGAL FUND; EQUAL RIGHTS ADVOCATES; FEMINIST MAJORITY FOUNDATION; NATIONAL ORGANIZATION OF WOMEN; NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES; NORTHWEST

WOMEN'S LAW CENTER; NOW LEGAL DEFENSE AND EDUCATION FUND; TITLE IX ADVOCACY PROJECT; TRIAL LAWYERS FOR PUBLIC JUSTICE; WOMEN EMPLOYED; WOMEN'S LAW PROJECT; WOMEN'S SPORTS FOUNDATION; UNITED STATES OF AMERICA,
Amici Supporting Appellant.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
James C. Cacheris, Senior District Judge.
(CA-97-1755-A)

Submitted: December 17, 2003

Decided: February 25, 2004

Before NIEMEYER, MICHAEL, and
TRAXLER, Circuit Judges.

Affirmed in part, vacated and remanded in part by unpublished per curiam opinion.

COUNSEL

Annette Greco Litman, Reston, Virginia, Appellant Pro Se. Ronald Curtis Forehand, William Eugene Thro, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees. Dina R. Lassow, NATIONAL WOMEN'S LAW CENTER, Washington, D.C., for Amici Curiae National Women's Law Center, American Association of University Women, AAUW Legal Advocacy Fund, American Civil Liberties Union Women's Rights Project, American Civil Liberties Union of Virginia, Incorporated, Center for Women Policy Studies, Connecticut Women's

Education and Legal Fund, Equal Rights Advocates, Feminist Majority Foundation, National Organization of Women, National Partnership for Women and Families, Northwest Women's Law Center, NOW Legal Defense and Education Fund, Title IX Advocacy Project, Trial Lawyers for Public Justice, Women Employed, Women's Law Project, Women's Sports Foundation; Linda Frances Thome, Seth Michael Galanter, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Amicus Curiae United States of America.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Annette Greco Litman appeals from the order of the district court denying relief on her claims relating to sexual harassment, gender-based discrimination, and retaliation. With regard to Litman's claims unrelated to retaliation, we have reviewed the record and find no error. Accordingly, we affirm as to those claims on the reasoning of the district court. *See Litman v. George Mason Univ.*, No. CA-97-1755-A (E.D. Va., Jan. 22, 1998; Filed May 7, 1998, & Entered May 8, 1998; Filed June 14, 2000, & Entered Jun. 15, 2000; Feb. 26, 2001).

With regard to Litman's remaining claim of retaliation, after entry of final judgment in the district court, this court decided *Peters v. Jenney*, 327 F.3d 307 (4th Cir. 2003), holding that Title VI confers a private right of action for retaliation. Because Title VI and Title IX are to

be interpreted in the same manner, *see Cannon v. University of Chicago*, 441 U.S. 677, 694-96 (1979), the decision in *Peters* compels the conclusion that Title IX likewise includes a private right of action for retaliation. Accordingly, we vacate that part of the district court's order dismissing Litman's retaliation claim and remand for further proceedings consistent with this opinion.

We deny Litman's pending motions to compel supplemental briefing and to file a reply brief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED IN PART; VACATED AND REMANDED IN PART

2001 WL 902469
156 F.Supp.2d 579

United States District Court, E.D. Virginia,
Alexandria Division.

Annette M. LITMAN, Plaintiff,

v.

GEORGE MASON UNIVERSITY, Defendant.

No. CA-97-1755-A.

Aug. 7, 2001.

Annette M. Litman, Reston, VA, Pro se.

William E. Thro, Special Assistant Attorney General, Newport News, VA, for Defendant.

MEMORANDUM OPINION

CACHERIS, District Judge.

Before the Court is an action brought pursuant to Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX"), alleging that a state-controlled university's administration and faculty retaliated against a student for filing a discrimination complaint. Once again, the Court is presented with a novel question: whether the Supreme Court's recent decision in *Alexander v. Sandoval,* a Title VI case, bars the plaintiff's claim for Title IX retaliation.[1] Defendant George Mason University

[1] In *Litman v. George Mason University,* 131 F.Supp.2d 795 (E.D.Va.2001), this Court denied, on oth r grounds, GMU's motion for summary judgment on the Title IX count. *See id.* at 797 n. 3 (noting that the Supreme Court had recently heard oral argument in the case of *Alexander v. Sandoval*).

has filed a Motion to Dismiss on that ground, and Plaintiff Litman has filed a Motion to Amend her 42 U.S.C. § 1983 claims. For the reasons stated below, the Court will grant the Motion to Dismiss and deny the Motion to Amend.

I.

Plaintiff Annette M. Litman was a student at George Mason University ("GMU") for approximately one year, from mid-1995 until mid-1996, when GMU expelled her after a hearing. GMU is a state-created university "subject at all times to the control of the [Virginia] General Assembly." Va.Code Ann. § 23-91.24. Moreover, the parties agree that GMU is a recipient of federal education funding within the meaning of Title IX, 20 U.S.C. § 1681(a).[2] *See* 20 U.S.C. § 1687.

The Supreme Court has recognized that Title IX carries an implied private right of action, *Cannon v. Univ. of Chicago,* 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), which permits students to recover damages for discriminatory conduct engaged in by their professors. *Franklin v. Gwinnett County Pub. Sch.,* 503 U.S. 60, 75-76, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Last year, this Court upheld Ms. Litman's private right of action to bring a Title IX retaliation claim. It is this proposition which GMU again challenges today.

In the recent case of *Alexander v. Sandoval,* 531 U.S. 1049, 532 U.S. 275, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001),

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[2] This provision applies to "any education program or activity receiving Federal financial assistance[.]" 20 U.S.C. § 1681(a).

the State of Alabama argued that there is no private right of action to enforce a disparate impact regulation promulgated under Title VI of the Civil Rights Act of 1964 ("Title VI"), and the Supreme Court agreed. The Court acknowledged that Congress has ratified *Cannon*'s holding that there is an implied private cause of action to enforce Title IX. *Sandoval,* 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1516; *see* 42 U.S.C. § 2000d-7; *Franklin,* 503 U.S. at 72, 112 S.Ct. 1028. For the first time, however, the Court limited that cause of action to enforcing rights actually articulated by Congress, not a federal agency. At the same time, the Supreme Court recognized but did not address the second issue raised by GMU, *i.e.,* whether an implied private cause of action against the States is inconsistent with the clear statement rule in *Pennhurst State School & Hospital v. Halderman,* 451 U.S. 1, 10, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981).

Pursuant to Federal Rule of Civil Procedure 12(b)(1), GMU has moved to dismiss Count II of the Complaint, which alleges retaliation in violation of Title IX, arguing that the Supreme Court's holding in *Sandoval,* by extension, bars enforcement by Ms. Litman of the anti-retaliation regulation passed pursuant to Title IX. Thus, GMU argues, the Court lacks subject matter jurisdiction over the retaliation claim. Ms. Litman has not filed a brief in opposition. GMU opposes Ms. Litman's Motion to Amend her Complaint.

II.

The federal courts have original subject matter jurisdiction over any civil action "authorized by law to be commenced by any person . . . [t]o recover damages or to

secure equitable or other relief under any Act of Congress providing for the protection of civil rights. . . . " 28 U.S.C. § 1343(a)(4). A Rule 12(b)(1) motion to dismiss "raises the question of the federal court's subject matter jurisdiction over the action." 5A Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure 2d § 1350 at 194 (1990). A party may raise the defense of the court's lack of subject matter jurisdiction at any time. *See Capron v. Van Noorden,* 6 U.S. (2 Cranch) 126, 2 L.Ed. 229 (1804); Fed.R.Civ.P. 12(h)(3). If, upon the suggestion of a party or *sua sponte,* the court determines that it lacks subject matter jurisdiction, it "shall dismiss the action." Fed.R.Civ.P. 12(h)(3).

The plaintiff has the burden of proving that subject matter jurisdiction exists. *See Richmond, Fredericksburg & Potomac R. Co. v. United States,* 945 F.2d 765, 768 (4th Cir.1991); Wright and Miller, § 1350 at 226. The court should grant the Rule 12(b)(1) motion to dismiss "only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law." *Id.* In passing on a motion to dismiss under Rule 12(b)(1), "the complaint will be construed broadly and liberally, . . . but argumentative inferences favorable to the pleader will not be drawn." Wright and Miller, § 1350 at 218-19.

III.

Like Title VI of the Civil Rights Act of 1964, which prohibits race discrimination, Title IX was passed pursuant to the Spending Clause. *See Gebser v. Lago Vista Indep. School Dist.,* 524 U.S. 274, 286-88, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). The Supreme Court has held that there is an implied right of action to enforce the substantive

guarantees of Spending Clause legislation. *See Cannon,* 441 U.S. at 694-99, 99 S.Ct. 1946. Congress intended that Title IX would be interpreted and enforced in the same manner as Title VI. *Cannon,* 441 U.S. at 696, 99 S.Ct. 1946. As is discussed below, the Secretary of Education has prohibited retaliation for filing a complaint of gender discrimination under Title IX.

In *Sandoval,* the Supreme Court considered whether the private right of action to enforce substantive guarantees in Title VI extended to disparate impact regulations promulgated pursuant to statutory authority. At issue in *Sandoval* was a state policy that driver's license examinations be administered in English. The source of the right being enforced proved to be an essential factor in whether an individual could enforce it: was the right found in the statute itself, or was it created by regulation (albeit a regulation authorized by statute and that effectuated the statutory rights)?

Key to the Supreme Court's analysis were analytical principles that prohibit courts from implying a private right of action that Congress has not permitted. As the Court stated:

> Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress. . . . The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy. . . . Statutory intent on this latter point is determinative. . . . Without it, a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.

Sandoval, 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1519 (citations omitted). The Court continued, "[w]e therefore begin (and find that we can end) our search for Congress's intent with the text and structure of Title VI." *Id.* at 1520. Only the substantive rights contained in the statute itself can be enforced through a private right of action; rights created by agency regulation cannot. *Id.* at 1521. Thus, in Section 601 of Title VI, 42 U.S.C. § 2000d, which decrees that "[n]o person . . . shall . . . be subjected to discrimination" by a recipient of federal funding, the Court found specific, rights-creating language enforceable by a private right of action.[3] *Id.* By contrast, Section 602 provides that "[e]ach Federal department and agency . . . is authorized and directed to effectuate the provisions of [§ 601]." *Id.;* 42 U.S.C. § 2000d-1. Pursuant to section 602, both the United States Department of Justice and the Department of Transportation promulgated regulations that forbade funding recipients from engaging in any activity having a disparate impact on racial groups. *Id.* at 1515; 28 C.F.R. § 42 .104(b)(2); 49 C.F.R. § 21.5(b)(2). Because section 601 prohibits only intentional discrimination,[4] the Court concluded that the right to be free from disparate impact discrimination was solely a product of agency regulation, not the statute itself. *Id.* at 1517. Again, courts are not free to infer a private right of action to enforce a right not created by Congress. *See, e.g., Massachusetts Mut. Life Ins. Co. v. Russell,* 473 U.S. 134,

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[3] *See Cannon,* 441 U.S. at 690 n. 13, 99 S.Ct. 1946 ("the right- or duty-creating language of the statute has generally been the most accurate indicator of the propriety of implication of a cause of action").

[4] *Alexander v. Choate,* 469 U.S. 287, 293, 105 S.Ct. 712, 83 L.Ed.2d 661 (1985).

145, 148, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985). The Court therefore held that there is no private right of action, under Title VI, to challenge an activity that has a disparate impact on a racial group. *Id.* at 1523.

As noted above, Title VI and Title IX were both enacted pursuant to Congress's Spending Clause powers, share a similar statutory structure, and are often interpreted in a similar manner. *See Gebser,* 524 U.S. at 286-88, 118 S.Ct. 1989. Paralleling the structure of Title VI, Title IX contains a provision that creates the substantive right to be free from discrimination "on the basis of sex," 20 U.S.C. § 1681,[5] as well as a provision empowering federal agencies to "effectuate" the terms of section 1681, 20 U.S.C. § 1682.[6] Pursuant to the latter provision, regulations enacted in the Title VI context were incorporated by the Department of Education into Title IX. *See* 34 C.F.R.

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[5] This provision reads in part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681.

[6] This provision reads in part:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, . . . , is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken.

20 U.S.C. § 1682.

§ 106.71. One of those regulations bars a recipient of federal funding from retaliating against a person who complains of gender discrimination in violation of Title IX. *See* 34 C.F.R. § 100.7(e).[7] The Fourth Circuit has recognized that the prohibition against retaliation is the product of a regulation, not contained in the statute itself. *See Preston v. Virginia ex rel. New River Community College,* 31 F.3d 203, 206 n. 2 (4th Cir.1994) (the Department of Education promulgated regulations pursuant to Title IX, including 34 C.F.R. § 100.7(e), which prohibits retaliation for filing discrimination claim).[8]

Although the Court lacks the benefit of a fully-developed legal argument from Ms. Litman, on July 30, 2001, after oral argument on the Motion to Dismiss, she delivered a letter to chambers in which she suggests that because Title VII's retaliation provision defines retaliation as a form of discrimination, the Court should, perhaps, properly view the prohibition on discrimination in Section

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[7] The regulation reads in part:

> e) Intimidatory or retaliatory acts prohibited. No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this part.

34 C.F.R. § 100.7(e).

[8] *See also Lowrey v. Texas A & M Univ. System,* 117 F.3d 242, 248 n. 6 (5th Cir.1997) ("While retaliation is technically a form of employment discrimination, *it is not independently prohibited by the proscription against discrimination on the basis of sex* in federally-funded educational institutions, which is the heart of Title IX.").

1681 as likewise encompassing retaliation.[9] In that event, the anti-retaliation regulation enacted pursuant to Section 1682 merely interprets Section 1681, rather than expanding its scope.[10]

For the following reasons, the Court rejects the suggestion that Title VII's definition of retaliation as a form of discrimination should guide the Court's interpretation of discrimination in the Title IX context. Title IX was enacted pursuant to Congress's Spending Clause power, while Title VII was enacted pursuant to its Commerce power. Whereas the provisions and regulatory schemes of Title IX and Title VI – both Spending Clause statutes – closely parallel each other, those of Title IX and Title VII do not.[11] The text of the Title VII retaliation provision is markedly different from that in Title IX and is therefore of limited usefulness in interpreting the Title IX retaliation provision. *See* 42 U.S.C. § 2000e-3(a).[12] Most obviously,

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[9] In the same letter, Ms. Litman states that "[t]o be honest with this Court, I have never actually felt that the application of Title VII law in a one-to-one fashion to Title IX was sound or beneficial." July 30, 2001 Letter at 3.

[10] Valid and reasonable interpretive regulations, which authoritatively construe the statute, may be enforced by a private right of action. *See Sandoval*, 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1518, and cases cited therein.

[11] *See Gebser*, 524 U.S. at 286, 118 S.Ct. 1989 (Title VI and Title IX "operate in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds. . . . That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition.") (citations omitted).

[12] This section provides in pertinent part that it shall be an unlawful employment practice for any employer to retaliate against an

(Continued on following page)

Title VII's ban on retaliation is part of the statute itself, not contained in an effectuating regulation. In light of *Sandoval,* this fact alone clearly differentiates a Title IX retaliation claim from a Title VII retaliation claim. The Court can be certain of Congress's intent only by examining the statute it enacted, not by perusing an agency's regulations, even though the regulations were promulgated pursuant to an effective delegation of authority and may, in some sense, "make effective the congressional purpose" expressed by a statute. *See J.I. Case v. Borak,* 377 U.S. 426, 433, 84 S.Ct. 1555, 12 L.Ed.2d 423 (1964). As the Supreme Court observed in *Sandoval,* its decision in *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), made clear that the courts' task is to focus on what Congress actually said, not what the Court thinks it might have meant. 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1520. The Court thus focuses on the text of the respective statutes and finds no clear Congressional intent that Title VII's standards would apply to a Title IX claim by a student against a university, as Ms. Litman proposes.[13]

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employee or an applicant for employment "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a) (West 2001). *Compare* the Title IX anti-retaliation regulation, 34 C.F.R. § 100.7(e), *supra* note 7.

[13] The Court notes that while the Fourth Circuit has referred to Title VII in analyzing a claim of Title IX retaliation, *see Preston,* 31 F.3d at 206, it has also suggested that such reference may be appropriate only in the employment discrimination context. *Id.* Because Title VII, of course, addresses employment discrimination, such usage is more logical than using Title VII principles in the non-employment context of Title IX.

Title VII's anti-retaliation provision is worded very narrowly: while it defines retaliation as a form of discrimination, it "provides no remedy for retaliation against individuals who raise charges of noncompliance with the substantive provisions of Title IX." *Lowrey v. Texas A & M Univ. System,* 117 F.3d 242, 249 (5th Cir.1997). Instead, it provides a remedy only for those who suffer retaliation after charging noncompliance with Title VII itself, *e.g.*, those who complain of discriminatory employment practices.[14] *Id.* The narrow wording of the Title VII prohibition implies that Congress sought to limit the scope of liability under the provision. This implication is furthered by the complex administrative scheme set up in Title VII – but not Title IX. A complaint filed under Title VII must pass through appropriate federal administrative channels before being brought in a court of law,[15] but a complaint filed under Title IX can be brought directly in the court system.[16] Congress thus defined discrimination more broadly in Title VII than Title IX, but it also imposed greater restrictions on an aggrieved party's right to bring suit.

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[14] Ms. Litman has not complained of discriminatory employment practices by GMU; if she had suffered retaliation after complaining of such practices, she could have brought suit under Title VII, which would have provided her a statutory right of action.

[15] *See* 42 U.S.C. § 2000e-4 (creating Equal Employment Opportunity Commission ("EEOC") and § 2000e-5(b), (f) (stating that "[w]henever a charge is filed," the EEOC "shall" initiate an investigation; aggrieved party may bring suit only after the EEOC has first been given a chance to act upon the complaint)).

[16] *See Cannon,* 441 U.S. at 694-99, 706 n. 41, 99 S.Ct. 1946.

The marked differences between both the statutory prohibitions and the administrative schemes created by Title VII and Title IX strongly weigh against expanding the scope of potential liability under Title IX for those receiving federal funds by interpreting "discrimination" to include retaliation, as under Title VII, when Congress did not clearly articulate such an understanding in the statutory text itself. Congress was aware that it could create a right of action for retaliatory treatment, and it did so in Title VII; it did not do so in Title IX.[17] When Congress so clearly chose to limit the scope of Title VII's right of action for retaliation to Title VII complaints, and further to restrict court action on that right to claims that have been administratively exhausted, the Court is reluctant to extend the right (and the manner in which the courts have interpreted it) to the Title IX context.

Still, even without reference to standards developed in the Title VII context, the Court must consider whether some plain reading of "discrimination," as prohibited in Section 1681, might encompass "retaliation," as prohibited by the Department of Education pursuant to Section 1682. A comparison of the two claims provides an answer to the query by highlighting their differences. Section 1681 prohibits discrimination "on the basis of sex," which means a victim of discriminatory treatment must show she

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[17] *Cf. Cannon,* 441 U.S. at 730, 99 S.Ct. 1946 (Powell, J., dissenting) ("As countless statutes demonstrate, including Titles of the Civil Rights Act of 1964, Congress recognizes that the creation of private actions is a legislative function and frequently exercises it. When Congress chooses not to provide a private civil remedy, federal courts should not assume the legislative role of creating such a remedy and thereby enlarge their jurisdiction.") (citations omitted).

directly suffered harm from that discrimination and that her gender motivated the improper treatment. On the other hand, a claim of retaliation is fundamentally an assertion that one spoke out about discrimination *and was punished for speaking out.* The harm from retaliation is not a direct result of discrimination on the basis of sex but stems from the actions one took in response to the discrimination. In other words, the harm suffered by a victim of retaliation, while prohibited by the Title IX regulations, is not clearly prohibited by Title IX's text, because it does not result directly from unlawful discrimination *on the basis of sex.*

The Supreme Court in *Sandoval* could point to case law interpreting section 601 that showed the challenged regulation exceeded the proper scope of Title VI. The Court does not have the advantage of case law clearly establishing that "retaliation" does not fall within the plain scope of "discrimination." Usually, the Court would defer to the governing agency's interpretation of the scope of the statute. Administrative agencies' construction of statutes are entitled to deference, provided that their interpretation of the law does not conflict with congressional intent. *See, e.g., NLRB v. Town & Country Elec., Inc.,* 516 U.S. 85, 89-90, 94, 116 S.Ct. 450, 133 L.Ed.2d 371 (1995) (giving deference to NLRB's interpretation of National Labor Relations Act); *National R.R. Passenger Corp. v. Boston & Maine Corp.,* 503 U.S. 407, 417, 112 S.Ct. 1394, 118 L.Ed.2d 52 (1992) (stating that judicial deference to agency interpretation is a "dominant, well-settled principle of federal law"). The Court has found, however, that Congress did not clearly intend to create a private right of action for a claim of retaliation under Title IX. Therefore,

because it exceeds Congress's intent, the agency's interpretation is not entitled to deference.

In short, 34 C.F.R. § 100.7(e) is a procedural provision detailing how to conduct an investigation, not a valid interpretation of 20 U.S.C. § 1681.[18] Thus, Ms. Litman's right to enforce the anti-retaliation regulation must come, if at all, from the independent force of section 1682. *Cf. Sandoval,* 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1519. In the aftermath of *Sandoval,* the Court finds that section 1682 conveys no such independent right of action. Section 1682, like section 602 in the Title VI context, merely authorizes the agency to "effectuate" the rights guaranteed by section 1681; the operative language *Sandoval* found not to create a right of action to enforce the challenged Title VI regulation, language which is essentially identical in Title VI and Title IX,[19] likewise does not create a private right of action in this case. The implied private right of action to seek redress for harm suffered because of discrimination does not extend to harm suffered because of retaliation, because as the discussion above demonstrates, the anti-retaliation regulation is not merely an interpretation of Section 1681 but expands the scope of prohibited conduct. "Language in a regulation may invoke a private right of action that Congress through

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[18] Again, valid statutory interpretations may be privately enforced. *See supra* n. 10.

[19] Compare Section 602 of Title VI, which provides that "[e]ach Federal department and agency ... is authorized and directed to effectuate the provisions of [section 601]," 42 U.S.C. § 2000d-1, with Section 1682 of Title IX, which likewise provides that "[e]ach Federal department and agency ... is authorized and directed to effectuate the provisions of section 1681." 20 U.S.C. § 1682.

statutory text created, but it may not create a right that Congress has not." *Sandoval,* 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1522 (*citing Touche Ross & Co. v. Redington,* 442 U.S. 560, 577, 99 S.Ct. 2479, 61 L.Ed.2d 82 n. 18 (1979)).

The Court notes that limiting the private right of action to enforcement of the statute's substantive provisions will not remove the incentive from federal funds recipients to protect federal civil rights in compliance with Title IX. Congress provided a strong incentive to entities receiving federal funds to comply with the directives of Title IX: failure to comply may lead to loss of federal funds. Agencies may also continue to enforce the statute and the anti-retaliation regulation against a funding recipient.[20] *See* 20 U.S.C. § 1682 (authorizing agency to enforce compliance with associated regulations by terminating funding or refusing to fund a program that is not in compliance, or "by any other means authorized by law").

In any event, the Supreme Court in *Sandoval* instructs this Court to consider only the "text and structure of Title [IX]." 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1520. To that end, as the discussion above demonstrates, reference to Title VII is useful insofar as it illuminates what Congress did *not* include in Title IX: an explicit statement that retaliation for exercising one's rights to be free from unlawful discrimination is itself a form of prohibited discrimination. The Court has not found any

[20] A question left open by the Supreme Court in *Sandoval,* and likewise not decided here, is whether an agency may permissibly enforce the regulations against a State entity.

evidence that Congress intended the Title VII anti-retaliation standards to apply in the Title IX context.[21] Indeed, although most Circuits have referred, at least in some circumstances, to Title VII standards in interpreting Title IX, *see Preston,* 31 F.3d at 206 and cases cited therein, the applicable agency regulations make clear that Title IX and Title VII are "independent" of each other. *See* 34 C.F.R. § 106.6(a). In any event, even if the historical context supported the use of Title VII standards to make out a Title IX retaliation case, the Court is bound by the text of the statute, not Congress's unstated intentions.[22] "We have never accorded dispositive weight to context shorn of text." *Sandoval,* 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1520.

Nor does the fact that the regulation itself contains rights-creating language mean that it must be privately enforceable. A similar argument was made and rejected by the Court in *Sandoval,* where the Court observed that "it is most certainly incorrect to say that language in a

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[21] *Contrast Cannon,* 441 U.S. at 694-698, 99 S.Ct. 1946 (observing that the legislative drafters of Title IX intended that it be enforced in the same manner as Title VI, and, in recognizing a private remedy under Title IX, relying upon an assumed awareness by legislators at the time they adopted Title IX that a private right of action had already been recognized under Title VI).

[22] *Cf. Cannon,* 441 U.S. at 718, 99 S.Ct. 1946 (Rehnquist, J., concurring) ("Congress, at least during the period of the enactment of the several Titles of the Civil Rights Act tended to rely to a large extent on the courts to decide whether there should be a private right of action, rather than determining this question for itself. . . . [How-ever it is] 'far better' for Congress to so specify when it intends private litigants to have a cause of action [and] for this very reason this Court in the future should be extremely reluctant to imply a cause of ac-tion absent such specificity on the part of the Legislative Branch.").

regulation can conjure up a private cause of action that has not been authorized by Congress." 531 U.S. at ___, 532 U.S. at ___, 121 S.Ct. at 1522. Because it exceeds the scope of section 1681, the regulation cannot of its own force create a right enforceable by Ms. Litman.

To summarize, although it specifically dealt with Title VI, the principles underlying the holding in *Sandoval* logically limit the scope of the private right of action to enforce Title IX. In the wake of *Sandoval,* the private right of action in such cases extends only to the substantive provisions contained in the statutes themselves, or to valid interpretive regulations. Thus, an individual may no longer bring suit to enforce effectuating regulations enacted pursuant to Title IX that expand the scope of prohibited discrimination. Ms. Litman alleges retaliation by GMU "for her complaints and her similar protected activities" – which is *not* discrimination *on the basis of her sex.* Verified Amended Complaint § 322. The Court's "limited factual inquiry necessary for ruling on a 12(b)(1) motion," *Arthur Young & Co. v. City of Richmond,* 895 F.2d 967, 969 (4th Cir.1990), demonstrates that this claim does not meet the jurisdictional requirement of 28 U.S.C. § 1343(a)(4) that the cause of action be "authorized by law": even if true, her allegations indicate conduct which violates an effectuating regulation but is permissible under the plain language of the statute itself. Therefore, because the Court lacks jurisdiction to hear a claim brought by an individual plaintiff pursuant to Title IX's anti-retaliation regulation, Count II of the Complaint must be dismissed.

IV.

Ms. Litman seeks leave to amend her 42 U.S.C. § 1983 claims. Pursuant to Federal Rule of Civil Procedure 15(a), once a responsive pleading has been served, a party may amend its complaint "only by leave of court or written consent of the opposing party; and leave shall be freely given when justice so requires." Fed.R.Civ.P. 15(a). In her initial Complaint, filed on October 31, 1997, Ms. Litman brought Section 1983 claims against GMU as well as two professors in their personal capacities. In two opinions in 1998, the Court dismissed the Section 1983 claims against GMU and one professor, while preserving only an equal protection claim against one of the professors. Mem. Op. of Jan. 22, 1998; *Litman v. George Mason Univ.*, 5 F.Supp.2d 366, 377 (E.D.Va.1998). The case then proceeded to the Fourth Circuit for resolution of a sovereign immunity issue. After remand, with the Court's consent, Ms. Litman filed a Verified Amended Complaint dropping the sole remaining Section 1983 claim but seeking to revive an already-dismissed Section 1983 claim. Such an amendment being beyond the scope of the Order allowing Ms. Litman to amend her Complaint, the Court dismissed the newly-reasserted claim. Mem. Op. of June 14, 2000, at 10.

Although she is now *pro se*, Ms. Litman was represented by counsel at the time she amended her Complaint. The Court recognizes that in most circumstances, amendment should be freely allowed. *See, e.g., Medigen of Kentucky, Inc. v. Public Serv. Comm'n of West Virginia*, 985 F.2d 164, 167-68 (4th Cir.1993). At this stage in the proceedings, however, the Court finds that further amendment would work prejudice upon the two professors who have been out of this case for some time and have a right to rely on the Court's prior adjudication of the claims

against them. While the Court has the authority to revisit its earlier decisions, Ms. Litman has not demonstrated to the Court that its prior adjudications on the Section 1983 claims were clearly erroneous, or that the Court's failure to revisit the claims would work a manifest injustice on her. *See Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 817, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988). Indeed, Ms. Litman acknowledges in her Motion to Amend that "the § 1983 counts have always been extraordinarily straightforward with respect to established law . . . " Motion to Amend at 2.

Although the Court should be particularly solicitous of the *pro se* plaintiff who seeks leave to amend her Complaint, Ms. Litman is not the typical *pro se* plaintiff who appears in this Court. She has maintained her case without the aid of counsel for more than six months, during which time she has been responsible for a good number of the nearly 100 pleadings and other items recorded on the case's docket. Despite Ms. Litman's lack of formal legal training, the Court notes that her pleadings very often contain careful legal analysis, albeit not always with reference to case law and the rules of the federal courts and this District.

The Court therefore DENIES her Motion to Amend her Complaint with regard to her 42 U.S.C. § 1983 claims.

V.

For the foregoing reasons, Defendant GMU's Motion to Dismiss Count II is GRANTED.[23] Plaintiff Litman's Motion to Amend with respect to the 42 U.S.C. § 1983 claims is DENIED. An appropriate Order will issue.

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[23] Because the case may be resolved on the basis of GMU's *Sandoval* argument, the Court does not consider the second ground raised in GMU's Motion to Dismiss, that is, whether there is a private right of action to bring a Title IX retaliation claim against a state university.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

ANNETTE M. LITMAN,	)	
Plaintiff,	)	
v.	)	Case No. CA-97-1755-A
GEORGE MASON UNIVERSITY,	)	
Defendant.	)	

ORDER

(Filed Aug. 7, 2001)

For the reasons stated in the accompanying Memorandum Opinion, it is hereby ORDERED that:

1) Defendant George Mason University's Motion to Dismiss Count II of the Verified Amended Complaint is GRANTED;

2) Plaintiff Annette M. Litman's Motion to Amend her 42 U.S.C. § 1983 claims is DENIED;

3) Should Plaintiff wish to appeal, she must file a written notice of appeal with the Clerk of this Court within thirty (30) days of the date of entry of this Order; and

4) The Clerk of the Court shall forward copies of this Order and the accompanying Memorandum Opinion to Plaintiff, *pro se*, and all counsel of record.

August 7th, 2001
Alexandria, Virginia

/s/ James Cacheris
UNITED STATES DISTRICT COURT JUDGE